Elite Jewellers Sdn Bhd v Wong Tin Kai

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-266 OF 1994
ABDUL MALIK ISHAK J
12 DECEMBER 1997

Civil Procedure *— Documents — Marking of documents as exhibits — Documents not in national language or English — Documents not translated — Whether they could be filed as exhibits — Whether corrective affidavit can be filed to translate exhibits — Rules of the High Court 1980 O 92 r 1*

Civil Procedure *— Summons-in-chambers — Copy not sealed — Application to set aside default judgment — Unsealed copy served on plaintiff — Whether there was an obligation on plaintiff to reply to affidavit — Whether plaintiff breached O 32 r 13(2)(b) of the Rules of the High Court 1980*

The defendant filed a summons-in-chambers ('encl 39') — supported by an affidavit affirmed on 17 September 1997 and filed on 18 September 1997 ('encl 38') — to set aside the judgment in default of appearance obtained by the plaintiff against the defendant. The unsealed copies of encls 39 and 38 were served on the plaintiff on 18 September 1997. The plaintiff responded and served their affidavit-in-reply in encl 44 to the defendant on 29 October 1997. At the hearing of encl 39, the defendant raised two preliminary objections: (i) that the plaintiff's affidavit-in-reply did not comply with O 32 r 13(2)(b) of the Rules of the High Court 1980 ('the RHC') and consequently, it should not be considered by the court; and (ii) that the exhibits in encl 44, especially the exhibits in LCC 2 and LCC 3 ('the exhibits') were not translated in the national language and should not to be taken as evidence. The senior assistant registrar dismissed the objections. The defendant appealed.

Held, allowing the appeal:

(1) On the construction of O 32 r 13(2)(b) of the RHC, it is only upon service of the sealed copy of the summons that there is an obligation to reply to the affidavit filed therein, as the affidavit cannot exist independently of the summons. A summons-in-chambers is not a summons until it is signed, sealed and dated by the court. Without the seal of the court, the plaintiff could not be compelled to reply by filing an affidavit-in-reply nor even be allowed to attend court. This being the case, the plaintiff's affidavit-in-reply in encl 44 was filed within time (see p 518A–C); *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 followed.

(2) There was no translation of the exhibits in the national language or the English language. Therefore, there was a clear breach of O 92 r 1 of the RHC, a mandatory provision which requires that any document which is not in the national language or the English language must be translated into the national language

before it can be admitted as an exhibit. As such, the exhibits would not be admitted and regarded as exhibits. Furthermore, a corrective affidavit cannot be filed to translate the exhibits annexed to the affidavit (see pp 519B–E and 520A–H); *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 followed and *Chio Tan Seng & Ors v Chong Chai Huat & Ors* [1997] 4 CLJ Supp 116 distinguished.

[Bahasa Malaysia summary

Defendan telah memfailkan suatu saman dalam kamar ('lampiran 39') — yang disokong oleh suatu afidavit yang diikrar pada 17 September 1997 dan difailkan pada 18 September 1997 ('lampiran 38') — untuk mengetepikan penghakiman ingkar kehadiran yang diperolehi oleh plaintif terhadap defendan. Salinan tak bermeterai lampiran 39 dan 38 disampaikan pada plaintif pada 18 September 1997. Plaintif membalas dan menyampaikan afidavit jawapan mereka dalam lampiran 44 kepada defendan pada 29 Oktober 1997. Di pembicaraan lampiran 39, defendan telah membangkitkan dua bantahan permulaan, iaitu bahawa: (i) afidavit jawapan plaintif tidak mematuhi A 32 k 13(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan oleh itu, ia tidak patut dipertimbangkan oleh mahkamah; and (ii) ekshibit-ekshibit dalam lampiran 44, terutamanya ekshibit dalam LCC 2 dan LCC 3 ('ekshibit tersebut') tidak diterjemahkan dalam bahasa kebangsaan dan tidak harus diambil sebagai keterangan. Penolong kanan pendaftar telah menolak bantahan. Defendan merayu.

Diputuskan, membenarkan rayuan:

(1) Atas tafsiran A 32 k 13(2)(b) KMT, hanya apabila salinan bermeterai saman disampaikan barulah terdapat kewajipan untuk membalas afidavit yang difailkan dalamnya, kerana afidavit tidak boleh wujud bebas daripada saman. Saman dalam kamar bukanlah saman sehingga ia ditandatangani, dimeterai dan diberi tarikh oleh mahkamah. Tanpa meterai mahkamah, plaintif tidak boleh dipaksa membalas dengan memfailkan afidavit jawapan atau pun dibenarkan menghadiri mahkamah. Oleh yang demikian, afidavit jawapan plaintif dalam lampiran 44 difailkan menepati masa (lihat ms 518A–C); *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 diikut.

(2) Tiada terjemahan ekshibit dalam bahasa kebangsaan atau bahasa Inggeris. Maka, terdapat kemungkiran yang jelas ke atas A 92 k 1 KMT, suatu peruntukan mandatori yang menghendaki bahawa apa-apa dokumen yang bukannya dalam bahasa kebangsaan atau bahasa Inggeris mestilah diterjemahkan ke dalam bahasa kebangsaan sebelum ia boleh diterima sebagai ekshibit. Oleh yang demikian, ekshibit tersebut tidak akan diterima dan dianggap sebagai ekshibit. Tambahan pula, afidavit pembetulan tidak boleh difailkan bagi menterjemahkan ekshibit yang

dilampirkan kepada afidavit (lihat ms 519B–E dan 520A–H); *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 diikut dan *Chio Tan Seng & Ors v Chong Chai Huat & Ors* [1997] 4 CLJ Supp 116 dibeza.]

Notes

For a case on marking of documents as exhibits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 1649.

For a case on copy of summons-in-chambers not sealed, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 4806.

Cases referred to

Batten, Re; ex p Milne (1889) 22 QBD 685 (refd)
Bukit Melita Sdn Bhd v Lam Geok Hee & Ors [1997] 4 AMR 3160 (refd)
Chio Tan Seng & Ors v Chong Chai Huat & Ors [1997] 4 CLJ Supp 116 (distd)
Gurbachan Singh v Seagrott & Campbell (No 2) [1962] MLJ 370 (refd)
Levy, ex p Walton, Re (1881) 17 Ch D 746 (refd)
Ng Kook Kin v PP [1995] 2 MLJ 35 (refd)
PP v Mohd Ali bin Jaafar [1997] 4 MLJ 221 (refd)
Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (folld)
Punca Klasik Sdn Bhd v Seok Kim Leow [1996)] 5 MLJ 241 (refd)
R v Banbury (Inhabitants) (1834) 1 Ad & El 136 (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)
Sheffeild v Ratcliffe (1615) Hob 334 (refd)
Structural Concrete Sdn Bhd & Ors v Wing Teik Holdings Bhd [1997] 1 MLJ 581 (refd)
Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 (folld)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)
Wright & Anor v Pepin [1954] 2 All ER 52 (refd)

Legislation referred to

Rules of the High Court 1980 O 32 r 13(2)(b), O 41, O 92 r 1

Clarence Edwin (*Abdul Raman Saad & Associates*) for the plaintiff.
T Rajasekaran (*RT Raja & Co*) for the defendant.

Abdul Malik Ishak J: The defendant filed a summons-in-chambers in encl 39 on 18 September 1997 to, inter alia, set aside the judgment in

default of appearance obtained by the plaintiff on 1 August 1995 against the defendant as reflected in encl 22. The defendant's application in encl 39 was supported by an affidavit of Wong Tin Kai affirmed on 17 September 1997 and filed on 18 September 1997 as reflected in encl 38. A

The unsealed copies of encll 39 and 38 were served on the plaintiff on 18 September 1997. The plaintiff responded and served their affidavit-in-reply in encl 44, that was affirmed by Lim Chiap Chuan @ Lim Chiap Chuah on 24 October 1997, to the defendant on 29 October 1997. At the hearing of the summons-in-chambers in encl 39 before the senior assistant registrar ('the SAR') on 4 November 1997, the defendant raised two preliminary objections couched in the following words: B C

(1) that the plaintiff's affidavit-in-reply in encl 44 did not comply with O 32 r 13(2)(b) of the Rules of the High Court 1980 ('the RHC') and consequently, it should not be considered by the court; and

(2) that the exhibits in encl 44 especially the exhibits in 'LCC 2' and 'LCC 3' from pp 24 to 375 were not translated in the national language and for this very reason, they ought not to be taken into account as evidence. D

The SAR heard the arguments on 4 November 1997 and dismissed the two preliminary objections with costs in favour of the plaintiff. Being aggrieved, the defendant lodged an appeal to the judge in chambers as reflected in encl 43, focusing entirely on the two preliminary objections. E

I heard encl 43 as an actual rehearing and considered the whole matter afresh, as though it came before me for the very first time. I am not fettered by the arguments advanced before the SAR and new arguments will certainly be heard and entertained. These propositions were advanced by Edgar Joseph Jr SCJ (now FCJ) in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 at p 106 and reiterated by his Lordship in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. F

Mr Clarence Edwin, learned counsel for the plaintiff, complained that he received the notice to raise these two preliminary objections just one day before encl 39 was fixed for hearing before the SAR. It was not a notice issued within a reasonable time. In *Gurbachan Singh v Seagrott & Campbell (No 2)* [1962] MLJ 370, Thomson CJ, speaking for the Court of Appeal, said at p 371 of the judgment: G

> Before departing from the case I should observe that the procedure followed by the respondents, that is to say giving the other side notice at the earliest possible moment and then dealing with the matter when the appeal comes on for hearing seems to be the course that was followed and certainly not disapproved of in the case of *Re Helsby* [1894] 1 QB 742. H

The effect of the failure of one party to give written notice of a preliminary objection to the opposite party was also considered by Low Hop Bing J in *Bukit Melita Sdn Bhd v Lam Geok Hee & Ors* [1997] 4 AMR 3160. In that case, his Lordship had this to say (at p 3163): I

> It is obvious that the whole purpose of the notice is to promote good etiquette amongst members of the Bar and more importantly to remove the element of surprise. It is necessary that the party against whom an objection is intended to be raised should not be taken by surprise and that both parties are given equal opportunities to prepare their submissions in order to ventilate all the relevant issues; being forewarned is being forearmed. Although it is true to say that the element of surprise in the instant case is completely non-existent since the parties herein are given adequate equal opportunity and time to prepare their respective written submissions, it must be immediately emphasized that the notice of objection must at all times be given to the other side. There can be no excuse for any delay, intentional or otherwise, in giving notice to the appellant.

It was emphasized that the notice was insufficiently given and the plaintiff was caught by surprise and for this reason the preliminary objections should be dismissed in limine. As I said, encl 43 was heard afresh and by now (between the hearing before the SAR and the present appeal), Mr Clarence Edwin should be able to muster the facts and the law to counter the two preliminary objections advanced by the defendant. An advocate and solicitor possesses adequate legal skill and knowledge and must be able to conduct himself admirably in court when faced with a contentious or non-contentious matter. After all, an advocate and solicitor's authority to act for his client arises from his retainer and it is confined to matters to which the retainer extends. This is clearly appreciated if it is borne in mind that the relationship of counsel to his client is, in general, one of agent to principal and the agent's authority would be governed by an agreement, express or implied, with his principal. A good illustration would be the case of *Wright & Anor v Pepin* [1954] 2 All ER 52 where the court there held that, although the solicitor was not authorized to acknowledge a mortgage debt, yet the solicitor had the authority to put his client's affairs in order by properly acknowledging the debt. Here, Mr Clarence Edwin was duty bound to put his client's affairs in order by rebutting those preliminary objections skilfully and to the advantage of his client.

The first preliminary objection

At present, there are two conflicting Court of Appeal decisions on the interpretation of O 32 r 13(2)(b) of the RHC. The first is *Structural Concrete Sdn Bhd & Ors v Wing Teik Holdings Bhd* [1997] 1 MLJ 581 which was decided on 15 May 1996 with the quorum of Shaik Daud, NH Chan and Mahadev Shankar JJCA. The second is *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 and this was decided on 11 July 1996 with the quorum of Siti Norma Yaakob, Abdul Malek Ahmad and Mokhtar Sidin JJCA.

A striking feature of these Court of Appeal cases is this: neither judgment considers the other. Each stands proudly on its own and I am bound by both these two Court of Appeal decisions.

Mahadev Shankar JCA wrote the decision for the Court of Appeal in *Structural Concrete* and there his Lordship computed the 14 days within

which an affidavit-in-reply must be filed and served from the date of the service of the unsealed copy of the summons-in-chambers and the affidavit in support. Siti Norma Yaakob JCA, writing for the Court of Appeal in *Perbadanan Nasional Insurans* held that the 14 days to file the affidavit-in-reply must run from the date of the service of the sealed copy of the summons-in-chambers and the affidavit in support. Her Ladyship had this to say (at pp 90–91):

> The affidavit in support cannot exist on its own independently of the summons and until the summons that it supports is sealed, the affidavit has no legal effect and neither does it create any obligation on the part of the party served with such an affidavit to reply to it. For this very reason, we consider that the obligation to reply has not arisen when the unsealed copy of the summons together with the affidavit in support was served for the first time on the respondent on 3 March 1995.

In the instant case, the unsealed copy of the summons-in-chambers in encl 39 and the unsealed copy of the affidavit in encl 38 were served on the plaintiff on 18 September 1997. The sealed copy of the summons-in-chambers in encl 39 was only served on the plaintiff on 16 October 1997. The plaintiff affirmed an affidavit-in-reply in encl 44 on 24 October 1997 and served it on the defendant on 29 October 1997. Applying *Structural Concrete*, the plaintiff should file the affidavit-in-reply by 2 October 1997. And when applying *Perbadanan Nasional Insurans*, the plaintiff should file the affidavit-in-reply by 30 October 1997. Now, in the context of *Structural Concrete* there would be a delay on the plaintiff's part in filing encl 44 by 27 days whereas by virtue of *Perbadanan Nasional Insurans*, the plaintiff was well within time by only one day. Since I am bound by the decisions of these Court of Appeal cases, each side submits that I should follow the authority that favours them.

Mr T Rajasekaran, learned counsel for the defendant, submitted that *Structural Concrete* should be adopted as it gave a literal interpretation of O 32 r 13(2)(b) of the RHC. In *Ng Kook Kin v PP* [1995] 2 MLJ 35, I did say the following (at p 41):

> Parliament in its wisdom has enacted s 20 of the Act by vesting in the sessions court the jurisdiction to hear and dispose of the cases under the Peraturan and the Act, and the courts cannot import words into it as to give it a meaning different from what was intended by Parliament. It is quite normal to determine the intent of the law for the court to look at a sentence from a purely grammatical point of view, so that in construing a statute, the court will disregard a punctuation or will repunctuate it if that be necessary, in order to arrive at the true purpose and natural meaning of the words employed. In the context of the present case, in construing s 20 of the Act, there is no need to disregard a punctuation or to repunctuate it, as the words employed therein are clear and unambiguous. *Ratnasamy*'s case cannot persuade me to hold that the magistrates' court has the necessary jurisdiction to handle the applicant's case. Even the most skillful counsel cannot make bricks without any straw (*Manchester Corp v Connolly* [1970] 1 All ER 961; [1970] 2 WLR 746).

In *PP v Mohd Ali bin Jaafar* [1997] 4 MLJ 221 at p 229, Augustine Paul JC (now J) said:

> Thus the fundamental rule of interpretation of a statute is to ascertain the intention of Parliament. If, the words of a statute are in themselves precise and unambiguous the court must give effect to them according to their natural and ordinary meaning, as the words themselves best declare the intention of Parliament. If, however, adhering to their grammatical and ordinary meaning would lead to some absurdity, or some repugnancy or inconsistency with the other parts of the statute, the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further (see *Trustees of the Kheng Chiu Tin Hon Kong and Burial Ground v Collector of Land Revenue* [1992] 1 SLR 425).

The business of this court is to determine the meaning behind O 32 r 13(2)(b) of the RHC and nothing else. The plain, ordinary meaning of the words used in the RHC is to be adopted in construing the RHC unless it results in some form of absurdity. As Jessel MR said in *Re Levy, ex p Walton* (1881) 17 Ch D 746 at p 751:

> The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

But I think the truth of the matter is this. That 'judges have perpetually taken refuge in the clouds and mist of strict and liberal interpretation whenever they have been pressed by the hardship or injustice of a particular case' (*Re Batten, ex p Milne* (1889) 22 QBD 685 at p 695). Lord Hobart put it aptly when he said in *Sheffeild v Ratcliffe* (1615) Hob 334 at p 346:

> If you ask me by what rules the judges guided themselves in diverse expositions of the self-same word and sentence, I answer, it is by that liberty and authority which judges have over statute laws according to reason and best convenience to mould them to the truest and best use.

For my part, the rule of construction is simply 'to intend the legislature to have meant what they have actually expressed' (per Parke J in *R v Banbury (Inhabitants)* (1834) 1 Ad & El 136 at p 142). Likewise here, I have to see what the rules committee intended to say when O 32 r 13(2)(b) of the RHC was formulated. Siti Norma Yaakob JCA in *Perbadanan Nasional Insurans* said (at p 89):

> We would like to add that O 32 r 13(2) was added by way of an amendment to the RHC for the orderly disposal of applications in chambers and it came into effect on 1 August 1993. It sets out the time frame within which affidavits, intended to be used in proceedings in chambers, either in support of or in reply to such applications, are to be filed and served, thereby preventing any last minute filing and service of such affidavits which, before the amendment, would have necessitated such applications being adjourned repeatedly, thereby causing delay.

I adopt these passages gratefully. Her Ladyship Siti Norma Yaakob JCA was right when she said that only upon service of the sealed copy of the summons was there an obligation to reply to the affidavit filed therein for the simple reason that the affidavit cannot exist independently of the summons. Of crucial importance to remember is this. A summons-in-chambers is not a summons until it is signed, sealed and dated by the court. What is the point of having a court of law if its very existence is not relied upon? The court is the right forum for the summons-in-chambers in encl 39 to be signed, sealed and dated. Without the seal of the court in encll 39 and 38, the plaintiff cannot be compelled to reply by filing an affidavit-in-reply nor even be allowed to attend court for that matter. With respect, the interpretation of O 32 r 13(2)(b) of the RHC in *Perbadanan Nasional Insurans* is to be preferred to that of *Structural Concrete* and consequently, I ruled that the affidavit-in-reply in encl 44 was filed within time.

By way of an addendum, Mahadev Shankar JCA writing for the Court of Appeal in *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453 (where the quorum comprised Zakaria Yatim, Shaik Daud and Mahadev Shankar JJCA) said at p 466 of the report:

> By PU (A) 192/93 on 1 August 1993, O 32 r 13 of the RHC was amended by the addition of a new sub-r (2) which made it mandatory for a party who was served with an affidavit in support of an application to file and serve his affidavit in reply within 14 days of the service of the affidavit in support of the application.

and this very passage strengthens his Lordship's interpretation of O 32 r 13(2)(b) of the RHC as illustrated in *Structural Concrete* of which I am bound but, with respect, my preference would be for *Perbadanan Nasional Insurans*. That is not the end of the matter. Having ruled encl 44 in favour of the plaintiff, the biggest hurdle to surmount would be the next preliminary objection.

The second preliminary objection

Enclosure 44 is a thick affidavit-in-reply and it contained the impugned exhibits marked as 'LCC 2' and 'LCC 3' which run from pp 24 to 375. They can conveniently be termed as receipts. Mr T Rajasekaran submitted that they comprised of vouchers, bills and invoices. Mr Clarence Edwin quickly took this opportunity and submitted that the defendant knew perfectly well the contents of the exhibits in encl 44. I have perused through the exhibits at pp 24–375 of encl 44 and I found them to bear writings in the Chinese characters. I am unable to decipher those handwritings in Chinese characters and I am sure both counsel too share the same predicament. Ignorance in this case is not blissful at all. Order 92 r 1 of the RHC states as follows:

> Any document required for use in pursuance of these rules shall be in the national language, and may be accompanied by a translation thereof in the English language:

A Provided that any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.

There was no translation of those exhibits in the national language or for that matter in the English language and there was thus a clear breach of O 92 r 1 of the RHC. In *Sykt Telekom Malaysia Bhd v Business Chinese* B *Directory Sdn Bhd* [1994] 2 MLJ 420, Eusoff Chin SCJ (now the Chief Justice of Malaysia) in trenchant terms said at p 423 of the report:

> In this case, the book 'Malaysian Business Chinese Directory', is in Chinese writing. Witnesses told the court that it contains a list of businesses and trade names together with their telephone numbers. The learned judge hearing the case cannot rely on the oral evidence of witnesses alone as to C what the contents of the book are. It is the primary function and duty of the learned judge to look at the book, to satisfy himself as to what it is, and decide, if necessary, with the help of the experts in the Chinese language and writing, whether the book is in fact a telephone directory as defined by the law. In this case, it is impossible for the learned judge, by looking at the book, to come to any decision simply because he himself is unable to D understand what it is.
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> We find that O 92 r 1 of the RHC is a mandatory provision which requires that any document which is not in the national language or in the English language must be translated into the national language before it can be admitted as an exhibit. Further, it has been held by the courts that rules of court are to be obeyed. Failure to comply with them will lead to chaos in E the conduct of litigation. See *Lee Guat Eng v Tan Lian Kim* [1985] 2 MLJ 196 and *Ratnam v Cumarasamy & Anor* [1964] 3 All ER 933; [1965] 1 WLR 8.
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> It is regretted that the well-founded submission of learned counsel for the respondent went unheeded in the court below. Secondary, ie oral F evidence of the witnesses about the contents of exh P7, a document (a book) in Chinese, should not have been considered by the court below as such evidence would become relevant normally only on the non-availability of exh P7 as when such non-availability is accounted for in (the) same way. Here the exh P7 was available and the appellant in fact submitted it in evidence without a certified translation of the same in the national language G in contravention of O 92 r 1 of the RHC. The High Court should not have admitted it as an exhibit. Without this book, there is no evidence to substantiate the appellant's claim, and for this reason, the appellant's claim must, therefore, fail.

I did say in *Punca Klasik Sdn Bhd v Seok Kim Leow* [1996] 5 MLJ 241, the H following (at p 252):

> From the authorities both foreign and local, two distinct principles can be garnered. The first principle is the time honoured principle that the rules of court and the associated rules of practice, devised by the Rules Committee and developed by the courts over the years to promote the expeditious despatch of litigation, must be rigidly observed. The prescribed time limits I are not targets to be aimed at or expressions of pious hope but rather requirements set which should be met rigidly by the parties thereto. This time honoured principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit.

On the authority of *Sykt Telekom Malaysia Bhd*, all those exhibits at pp 24–375 of encl 44 will not be admitted and regarded as exhibits. There was an oral application by Mr Clarence Edwin for me to direct the plaintiff to provide the necessary translations of those exhibits so that the affidavit-in-reply in encl 44 and its exhibits therein would be saved. It was implored upon me that a corrective affidavit would save the day for the plaintiff and a corrective affidavit was filed in *Chio Tan Seng & Ors v Chong Chai Huat & Ors* [1997] 4 CLJ Supp 116. In that case, I did say (at pp 144–145):

> On the issue of a jurat, it was submitted that only the affidavit of Chio Tan Seng that was affirmed on 21 January 1997 as reflected in encl 37 had a jurat. All the other affidavits of Chio Tan Seng were without jurats, so the submission went. Order 42 r 2(2) of the RHC states that:
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> > 'When the oath is administered to deponents in different languages, there shall be a separate jurat for those sworn in each language.'
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> Chio Tan Seng swiftly affirmed an affidavit in encl 89 on 11 April 1997 and that affidavit was in the nature of a corrective affidavit in support of Chio Tan Seng's affidavit that was affirmed on 20 December 1996 (encl 5). Enclosure 89 contained a jurat. In short, encl 89 was duly executed and attested and had a proper jurat. The use of a defective affidavit finds its approval in O 41 r 4 of the RHC which states that:
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> > 'An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.'
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> Great latitude must be accorded to O 41 r 4 of the RHC. In other jurisdictions, an affidavit which contained an interlineation and that interlineation was not initialled by the notary before whom the affidavit was sworn was allowed to be filed because the words were said to be immaterial (*Re Cloake* 61 LJ Ch 69). In *Eddowes v Argentine Mercantile Agency Co* 38 WR 629, the court there, for instance, allowed an affidavit to be received in evidence even though the crucial words 'before me' were omitted from the jurat. In *Blamey v Blamey* [1902] WN 138, the court went to the extreme of allowing affidavits sworn in America to be filed though the title was omitted. Perhaps the extent of the court's indulgence was stretched to its limit when the court in *Underdown v Stannard* [1871] WN 171 allowed the affidavit taken off the file, which should rightly be kept in the file, to be corrected and resworn and to be re-filed again without incurring any further fee. I have no hesitation in accepting encl 89 as its contents were on all fours with encl 5 except that it had a jurat.

and it can never be equated with the present case. Factually, that case can be distinguished. There I did not order that Chio Tan Seng should file a corrective affidavit and it was simply filed. The corrective affidavit was filed to incorporate the jurat and not to translate the exhibits annexed to the affidavit in the national language or in the English language. Mr Clarence Edwin proceeded to highlight the differences of *Sykt Telekom Malaysia Bhd* in this way:

(1) there the Chinese business directory was completely in the Mandarin language but not the case here; and

(2) that case decided on the issue of the acceptance of exhibits at the full trial as opposed to the present case where it involved affidavits within the meaning of O 41 of the RHC.

These differences as highlighted by Mr Clarence Edwin overlooked the need to translate documents in the national language or even the English language. Without these translations, I would not be able to understand nor comprehend those exhibits in question. *Sykt Telekom Malaysia Bhd* is a decision of the (then) Supreme Court of Malaysia and it is binding on me. It is a decision that will withstand the test of time. I ruled the second preliminary objection in favour of the defendant.

The result was obvious. Enclosure 43 was allowed with costs.

Appeal allowed.

Reported by Hanim Kamaruddin